

SOAH DOCKET NO. 460-16-0550

TEXAS BOARD OF PROFESSIONAL	§	BEFORE THE STATE OFFICE
ENGINEERS,	§	
Petitioner	§	
	§	OF
v.	§	
	§	
TIRE ENGINEERS,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Professional Engineers (Board) brought this action seeking the issuance of a cease and desist order and the assessment of an administrative penalty against Tire Engineers (TI/Respondent). The basis for this action was Respondent’s alleged use of the term “engineers” as part of its business name without being registered as a professional engineer. The Administrative Law Judge (ALJ) recommends that Respondent be issued a cease and desist order and assessed an administrative penalty of \$5,000.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened March 3, 2016, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Staff Attorney Morgen Cuming. Respondent was represented by attorneys Michael J. Douglas and Leonard W. Woods. The record closed at the conclusion of the hearing.

Staff offered competent evidence establishing jurisdiction and that appropriate notice of the hearing was provided to Respondent. Those matters are set out in the findings of fact and conclusions of law.

On January 5, 2016, Staff filed a Motion for Summary Disposition (MSD). The basis of the MSD was that Respondent was using the word “engineers” in its name without being registered by the Board in violation of Texas Occupations Code (Code) § 1001.405(e)(1)-(2) and

the Board rule at 22 Texas Administrative Code (TAC) § 137.71(1). Respondent filed its Response to the MSD on February 5, 2016. Respondent asserted that it was not required to be registered by the Board because it was not practicing engineering, and that Staff's interpretation of the statutes on which it relied regarding the use of the word "engineers" in its name violated its right to commercial speech and was preempted by federal law.

Because it is well-established that the constitutionality of a statute cannot be determined in an administrative hearing,¹ the ALJ determined that he could not consider the issues of federal preemption of a state statute or commercial speech. On February 25, 2016, the ALJ issued an Order Granting Partial Summary Disposition in this case, finding that Respondent had violated the above-stated statute and rule of the Board. The only remaining issue to address is what, if any, sanction should be imposed against Respondent.

II. REASONS FOR DECISION

A. Applicable Law

Code § 1001.405(e) provides as follows:

A business entity may not represent to the public that it is engaged in the practice of engineering under any business name or use or cause to be used the term "engineer," "engineering," "engineering services," "engineering company," "engineering, inc.," "professional engineers," "licensed engineer," "registered engineer," "licensed professional engineer," "registered professional engineer," or "engineered," or any abbreviation or variation of those terms, or directly or indirectly use or cause to be used any of those terms in combination with other words, letters, signs, or symbols as a part of any sign, directory, listing, contract, document, pamphlet, stationery, advertisement, signature, or business name unless:

- (1) the business entity is registered under this section;
- (2) the business entity is actively engaged in the practice of engineering;

¹ *Texas State Board of Pharmacy v. Walgreens Texas Company*, 520 S. W. 2d 845 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)

....

The Board rule at 22 TAC § 137.71 provides that

a business entity that is not registered with the board may not represent to the public by way of letters, signs, or symbols as a part of any sign, directory, listing, contract, document, pamphlet, stationery, advertisement, signature, or business name that it is engaged in the practice of engineering by using the term

(1) “engineer,”

.....

Code § 1001.501 provides that the Board “may impose an administrative penalty on a person who violates” the statutes or a Board rule relating to the practice of engineering. Code § 1001.5511 provides that if a person who is not licensed, certified, or registered is violating the statutes or a Board rule relating to the practice of engineering, the Board “may issue a cease and desist order prohibiting the person from engaging in the activity.”

The Board rule at 22 TAC § 139.35(c) sets forth the suggested sanction for violation of Code § 1001.405(e). Code § 1001.502(b) sets forth the factors to consider when determining the amount of an administrative penalty.

B. Facts Found in Order Granting Partial Disposition

Respondent is a wholly owned subsidiary of Express Oil Change, LLC (EOC). TI/EOC holds federal registered trademarks for the phrase “Tire Engineers.” Respondent operates five locations in the State of Texas that are in the business of the repair of automobiles, specifically, oil changes, tire rotation, wheel balance, engine services, belts, air conditioning, computerized diagnostics, and transmission services.

From on or about June 17, 2014, and continuing to the present day, Respondent operated stores in Missouri City and Houston, Texas, that displayed signage that included the phrase “Tire

Engineers.” Respondent is not registered by the Board and is not actively engaged in the practice of engineering.

C. Evidence Regarding Disciplinary Action

C. W. Clark, who is Director of Compliance of the Board, testified that, according to the Administrative Penalty Worksheet,² based on three complaints (only two of which were included in Staff’s pleadings), Respondent had violated the above-stated statute and rule three times. He testified that these violations supported the assessment of a \$5,000 administrative penalty for each occurrence for a total penalty of \$15,000. In addition, Mr. Clark testified that a cease and desist order should be issued against Respondent’s continued use of the term “engineers.”

On cross-examination, Mr. Clark agreed that Respondent had not offered to perform engineering services; that there had been no hazard to the health, safety, property, or welfare of the public; and that Respondent had not gained any economic benefit from the use of the term “engineers.”

D. Analysis and Recommendation

Respondent is subject to disciplinary action by the Board pursuant to Code § 1001.501 that authorizes the Board to impose an administrative penalty on a person who violates a statute or a rule, and Code § 1001.5511 that authorizes the Board to issue a cease and desist order prohibiting a person who is not registered from violating a statute or rule. Because Respondent uses the term “engineers” as part of its business name, the issuance of a cease and desist order to require Respondent to discontinue using the term “engineers” is appropriate. The remaining issue is the appropriate amount of an administrative penalty.

Code § 1001.502(a) provides that “the amount of an administrative penalty may not exceed \$5,000 for each violation. Each day a violation continues or occurs is a separate violation

² Staff Ex. O.

for purposes of imposing a penalty.” Staff is seeking a \$15,000 penalty based on three separate complaints. However, there are only two complaints in the record that served as the basis for the finding of violations in the Order Granting Partial Summary Disposition.³ Accordingly, using Staff’s rationale, the appropriate penalty would only be \$10,000.

In addition, according to the table of sanctions set forth in the rule at 22 TAC § 139.35(c), a violation of Code § 1001.405(e) has a **suggested** sanction of a \$5,000 penalty. Respondent argues that the appropriate amount of the penalty in this case should be based on the factors set forth in Code § 1001.502(b) as follows:

- (1) the seriousness of the violation, including:
 - (A) the nature, circumstances, extent, and gravity of the prohibited act;
and
 - (B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;
- (2) the economic harm to property or the environment caused by the violation;
- (3) the history of previous violations;
- (4) the amount necessary to deter a future violation;
- (5) efforts or resistance to efforts to correct the violation; and
- (6) any other matter that justice may require.

Based on the testimony of Mr. Clark, Respondent argues that if any penalty is appropriate, it should not be greater than the \$5,000 sought in Staff’s original complaint.

It is clear from the testimony of Mr. Clark and the facts of this case that this violation does not pose a hazard to the public or economic harm to property or the environment. This dispute primarily concerns constitutional issues and is not one where Respondent has been shown to be unreasonably resisting efforts of the Board to enforce the statute and rule, or one where a large fine is necessary to deter future violations. The ALJ has no doubt that the constitutional issues raised by Respondent will be considered in an appropriate forum. Accordingly, the ALJ is of the opinion that a \$5,000 penalty is appropriate.

³ A copy of a third complaint not referenced in Staff’s pleadings was not admitted into the record.

III. FINDINGS OF FACT

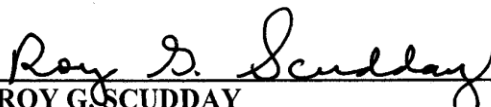
1. Tire Engineers, Inc. (TI/Respondent) is a wholly owned subsidiary of Express Oil Change, LLC (EOC).
2. TI/EOC holds federal registered trademarks for the phrase "Tire Engineers."
3. Respondent operates five locations in the State of Texas that are in the business of the repair of automobiles, specifically, oil changes, tire rotation, wheel balance, engine services, belts, air conditioning, computerized diagnostics, and transmission services.
4. From on or about June 17, 2014, and continuing to the present day, Respondent operated stores in Missouri City and Houston, Texas, that displayed signage that included the phrase "Tire Engineers."
5. Respondent is not registered by the Texas Board of Professional Engineers (Board) and is not actively engaged in the practice of engineering.
6. On October 5, 2015, staff (Staff) of the Board sent an Original Complaint to Respondent.
7. On December 1, 2015, Administrative Law Judge (ALJ) Roy G. Scudday issued Order No. 3, setting a prehearing schedule and hearing. The Original Complaint and Order No. 3 together contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the matters asserted.
8. On January 5, 2016, Staff filed a Motion for Summary Disposition (MSD). Respondent filed its Response to the MSD on February 5, 2016. On February 25, 2016, the ALJ issued Order No. 6 Granting Partial Summary Disposition.
9. The hearing on the merits was held on March 3, 2016, before ALJ Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. All parties appeared and participated in the hearing. The record closed at the conclusion of the hearing.
10. Pursuant to the table of sanctions set forth at 22 Texas Administrative Code (TAC) § 139.35 the suggested sanction for use of the term "engineers" without being registered with the Board is the issuance of a cease and desist order and the assessment of a \$5,000 penalty for each violation.
11. There is no evidence that Respondent committed a violation that poses a hazard to the public or economic harm to property or the environment.

12. There is insufficient evidence that Respondent is unreasonably resisting efforts of the Board to enforce the statute and rule.
13. There is no evidence that a large fine is necessary to deter future violations.

IV. CONCLUSIONS OF LAW

1. The Board is the agency charged with administering and enforcing the provisions of the Texas Professional Engineers Act and the Board Rules. Tex. Occ. Code (Code) ch. 1001.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Tex. Gov't. Code ch. 2003.
3. Notice of the complaint and of the hearing on the merits was provided as required. Tex. Gov't. Code §§ 2001.051-.052.
4. Staff had the burden of proving the case by a preponderance of the evidence. 1 TAC § 155.427.
5. Based on the findings set forth in Findings of Fact Nos. 1-5, Respondent used the term "engineers" in its business name without being registered with the Board in violation of Code § 1001.405(e) and the Board's rule at 22 TAC § 137.71(1).
6. Respondent is subject to disciplinary action by the Board pursuant to Code §§ 1001.501 and 1001.5511 for the above-stated violation.
7. Based on the findings set forth in Findings of Fact Nos. 10-13 and the violation set forth in Conclusion of Law No. 5, the Board should issue a cease and desist order and assess an administrative penalty of \$5,000 against Respondent.

SIGNED March 22, 2016.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS